

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 NICHOLE MARIE BENNETT,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL, Acting
14 Commissioner of the Social Security
Administration,

15 Defendant.
16

CASE NO. 3:17-CV-05548-JRC

ORDER ON PLAINTIFF'S
COMPLAINT

17
18 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
19 Local Magistrate Judge Rule MJR 13 (*see also* Consent to Proceed Before a United
20 States Magistrate Judge, Dkt. 4). This matter has been fully briefed. *See* Dkt. 11, 19, 21.

21 After considering and reviewing the record, the Court concludes that the ALJ
22 erred by failing to discuss all of the medical opinions from the state agency consulting
23 doctor, such as the opinion that plaintiff only could engage in superficial interaction with
24

1 supervisors. *See* AR. 31. Fully crediting this opinion could lead to a finding of disability
2 as it is unclear the exact amount of interaction with supervisors that is required for the
3 three positions the ALJ found that plaintiff could perform. It is unclear if the amount of
4 interaction with supervisors required is more than superficial.

5 Therefore, for the reasons stated herein and based on the record as a whole, the
6 Court concludes that this matter is reversed and remanded pursuant to sentence four of 42
7 U.S.C. § 405(g) to the Acting Commissioner for further consideration.

8 BACKGROUND

9
10 Plaintiff, NICHOLE MARIE BENNETT, was born in 1989 and was 24 years old
11 on the amended alleged date of disability onset of December 20, 2013. *See* AR. 43, 182-
12 87. Plaintiff attended high school until the eleventh grade and obtained her GED two
13 years later. AR. 45. She has no work history. AR. 45-46

14 According to the ALJ, plaintiff has at least the severe impairments of “Chiari
15 malformation with headaches, scoliosis, and affective disorder (20 CFR 416.920(c)).”
16 AR. 25. At the time of the hearing, plaintiff was living in a house with her three children.
17 AR. 57-59.

18 PROCEDURAL HISTORY

19 Plaintiff’s application for Supplemental Security Income (“SSI”) benefits pursuant
20 to 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act was denied initially and
21 following reconsideration. *See* AR. 90-97, 99-110. Plaintiff’s requested hearing was held
22 before Administrative Law Judge Kelly Wilson (“the ALJ”) on June 26, 2015. *See* AR.
23
24

1 39-79. On December 31, 2015, the ALJ issued a written decision in which she concluded
2 that plaintiff was not disabled pursuant to the Social Security Act. *See* AR. 20-38.

3 In plaintiff's Opening Brief, plaintiff raises the following issues: The ALJ erred
4 in (1) failing to include in his residual functional capacity finding, all of the limitations
5 assessed by Gary L. Nelson, PhD.; (2) rejecting the opinion of W. Daniel Davenport,
6 MD; and (3) rejecting plaintiff's testimony. *See* Dkt. 11, pp. 1-2.

7 STANDARD OF REVIEW

8 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
9 denial of social security benefits if the ALJ's findings are based on legal error or not
10 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
11 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
12 1999)).

14 DISCUSSION

15 **(1) The ALJ erred in failing to include in her residual functional capacity** 16 **finding all of the limitations assessed by Dr. Gary L. Nelson, PhD.**

17 Plaintiff contends that the ALJ erred in failing to include in her residual functional
18 capacity ("RFC") finding all of the limitations assessed by Dr. Gary. L. Nelson, Ph.D.
19 *See* Dkt. 11, pp. 3-4. Defendant contends that there is no error as the RFC is consistent
20 with Dr. Nelson's opinion. *See* Dkt. 19, pp. 3-5.

21 Dr. Nelson reviewed plaintiff's medical record and provided an opinion for the
22 Washington state agency, Disability Determination Services ("DDS"). AR. 99-110.
23
24

1 Among other opinions, he opined that plaintiff only was capable of “superficial
2 interaction with coworkers and supervisors” *See* AR. 108.

3 The ALJ gave “some weight” to the July 14, 2014 psychiatric review technique
4 and mental assessment from DDS psychologist consultant Gary Nelson, PhD.” AR. 31
5 (citing AR. 99-110). The ALJ failed to note the specific opinion from Dr. Nelson
6 regarding that plaintiff only is capable of “superficial interaction with [] supervisors . .
7 . .” *See* AR. 31, 108.

8 According to Social Security Ruling 96-6p, state agency medical consultants,
9 while not examining doctors, “are highly qualified physicians and psychologists who are
10 experts in the evaluation of the medical issues in disability claims under the Act.” SSR
11 96-6p, 1996 LEXIS 3 at *4. Therefore, regarding state agency medical consultants, the
12 ALJ is “required to consider as opinion evidence” their findings, and also is “required to
13 explain in [her] decision the weight given to such opinions.” *Sawyer v. Astrue*, 303 Fed.
14 Appx. 453, *455, 2008 U.S. App. LEXIS 27247 at **2-**3 (9th Cir. 2008) (citing 20
15 C.F.R. § 416.927(f)(2)(i)-(ii); SSR 96-6p, 1996 SSR LEXIS 3, *5) (memorandum
16 opinion) (unpublished opinion¹). According to Social Security Ruling (hereinafter
17 “SSR”) 96-6p, “[a]dministrative law judges may not ignore the[] opinions [of
18 state agency medical and psychological consultants] and must explain the weight given to
19 the opinions in their decisions.” SSR 96-6p, 1996 SSR LEXIS 3, 1996 WL 374180 at *2.
20 This ruling also provides that “the administrative law judge or Appeals Council must
21
22

23 ¹ This unpublished decision is citable under Rule 32.1 of the Federal Rules of Appellate
24 Procedure. *See also* 9th Cir. R. 36–3(b).

1 consider and evaluate any assessment of the individual's RFC by State agency medical or
2 psychological consultants," and said assessments "are to be considered and addressed in
3 the decision." *Id.* at *10.

4 Here, the ALJ erred by failing to mention the specific opinion from the state
5 agency doctor, Dr. Nelson, regarding limitation to superficial interaction with
6 supervisors. *See* AR. 108.

7 Defendant's argument that the ALJ's RFC is consistent with this opinion suggests
8 a position that the error is harmless. However, not only did the ALJ fail to mention the
9 opinion of Dr. Nelson regarding limitation to superficial interaction with supervisors, but
10 also, the ALJ failed to include any limitation on plaintiff's ability to interact with
11 supervisors in the RFC. *See* AR. 27.

12 The Ninth Circuit has "recognized that harmless error principles apply in the
13 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
14 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
15 Cir. 2006) (collecting cases)). The Ninth Circuit has reaffirmed the explanation in *Stout*
16 that "ALJ errors in social security are harmless if they are 'inconsequential to the ultimate
17 nondisability determination' and that 'a reviewing court cannot consider [an] error
18 harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting
19 the testimony, could have reached a different disability determination.'" *Marsh v. Colvin*,
20 792 F.3d 1170, 1173 (9th Cir. 2015) (citing *Stout*, 454 F.3d at 1055-56). In *Marsh*, even
21 though "the district court gave persuasive reasons to determine harmlessness," the Ninth
22 Circuit reversed and remanded for further administrative proceedings, noting that "the
23
24

1 decision on disability rests with the ALJ and the Commissioner of the Social Security
2 Administration in the first instance, not with a district court.” *Id.* (citing 20 C.F.R. §
3 404.1527(d)(1)-(3)).

4 Here, defendant contends that the jobs which the ALJ found that plaintiff could
5 perform “do not require significant interaction with people.” Dkt. 19, p. 5. However, Dr.
6 Nelson did not opine that plaintiff could perform jobs as long as the interaction with
7 supervisors is not significant, he opined that plaintiff can interact with them superficially.
8 Saying that the jobs which the ALJ found that plaintiff could perform “do not require
9 significant interaction with people,” is not the same as saying that one who only can
10 perform superficial interaction with supervisors can perform these jobs. Dkt. 19, p. 5.
11 Making such a determination is for the ALJ, with the assistance of someone with
12 expertise in translating specific limitations and abilities into specific occupations, (*i.e.*,
13 the vocational expert, (“VE”)). As noted by the ALJ, in order “to determine the extent to
14 which [plaintiff’s] limitations erode the unskilled light occupational base, I asked the
15 vocational expert whether jobs exist in the national economy for an individual with the
16 claimant’s age, education, work experience, and residual functional capacity [‘RFC’].”
17 AR. 32. Making this dispositive determination is best left to the ALJ, with the assistance
18 of a VE.
19

20 For this reason, and because the ALJ did not even mention this particular opined
21 limitation, the Court cannot conclude with confidence ““that no reasonable ALJ, when
22 fully crediting [Dr. Nelson’s opinion], could have reached a different disability
23 determination.”” *See Marsh*, 792 F.3d at 1173 (citing *Stout*, 454 F.3d at 1055-56).
24

1 Therefore, the error is not harmless.

2 Further administrative proceedings would serve a useful purpose as it is not clear
3 from the record that plaintiff is indeed disabled. *See Harman, supra*, 211 F.3d at 1178
4 (quoting *Smolen, supra*, 80 F.3d at 1292) (remand with a direction to award benefits is
5 not appropriate if it is not clear from the record that the ALJ would be required to find
6 plaintiff disabled were the inappropriately discredited evidence credited in full). The
7 ability of plaintiff to interact with supervisors requires further development, as the ALJ
8 did not discuss this specific opined limitation. Thus, it is not clear that crediting in full all
9 of the limitations opined by Dr. Nelson necessarily leads to a determination of disability.
10

11 **(2) Whether the ALJ erred in rejecting plaintiff's testimony.**

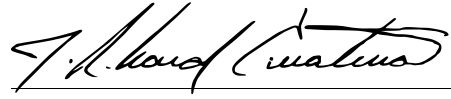
12 The Court already has concluded that the ALJ erred in reviewing the medical
13 evidence and that this matter should be reversed and remanded for further consideration,
14 *see supra*, section 1. In addition, the evaluation of a claimant's statements regarding
15 limitations relies in part on the assessment of the medical evidence. *See* 20 C.F.R. §
16 404.1529(c); SSR 16-3p, 2016 SSR LEXIS 4. Therefore, plaintiff's testimony and
17 statements should be assessed anew following remand of this matter.
18

19 **CONCLUSION**

20 Based on the stated reasons and the relevant record, the Court **ORDERS** that this
21 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
22 405(g) to the Acting Commissioner for further consideration consistent with this order.
23
24

1 **JUDGMENT** should be for **plaintiff** and the case should be closed.

2 Dated this 3rd day of April, 2018.

3
4 

5 J. Richard Creatura
6 United States Magistrate Judge
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24